No. 357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

ALAMO EXPRESS, INC., ET AL, *Appellants*

vs.

THE UNITED STATES OF AMERICA, ET AL, *Appellees*

On Appeal From The United States District Court
for the Western District of Texas
San Antonio Division

BRIEF OF APPELLANTS OPPOSING MOTION OF APPELLEES THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

This brief of Appellants in opposition to the Motion to Affirm, filed by Appellees The United States of America and The Interstate Commerce Commission (Commission) is filed pursuant to Rule 16.3 of the Revised Rules of this Court.

STATEMENT

The control by Central Freight Lines Inc. (Central) of Inland Motor Freight Lines, Inc. (Inland) was first denied by the Commission on January 11, 1963 upon the basis of the Commission's prior holding in *Yellow Transit Freight Lines, Inc. — Purchase (Portion) — Inland Motor Freight Lines, Inc. (Frank*

Brackney, Receiver), 65 MCC 775 (herein called "*Yellow Transit*" case) involving the same Inland carrier, that the transaction may not be sanctioned in the public interest because there had been a severance of interstate and corresponding intrastate rights, theretofore operated by a single carrier, which might or had resulted in the creation of two rights, in place of one, to operate in interstate or foreign commerce over the same highways and between the same points. [J.S. A-12][1, 2] Upon reconsideration, the Commission by order of July 23, 1963, denied applicants' Petition for Reconsideration in the *control* application in all respects but postponed the effective date of the order of January 11, 1963 pending further order [J.S. A-40].

On November 15, 1963, the Commission, in furtherance of its order of July 23, 1963, while modifying the prior divestiture requirement in the report and order of January 11, 1963, did not modify its prior denial of the *control* application [J.S. A-42 et seq.].

On June 29, 1964, the Commission, pursuant to late filed petition by applicants in the *control* application,

---

[1]Appellants JURISDICTIONAL STATEMENT is herein referred to as "J. S."

[2]The Commission's consideration of its *complaint* against applicants for unlawful acquisition of control of Inland contrary to statute in the orders should not serve to confuse the issue in the *control* case. In the *complaint* case the Commission adhered to its original finding of January 11, 1963 that Central and its officers were unlawfully controlling Inland, originally requiring Central and its officers "to dispose of all of their interest, direct or indirect, in Inland or in any of its stock." Subsequently [J.S. A-42 et seq.] on November 15, 1963 the Commission, on the basis of *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 modified the divestiture requirement of the *complaint* cases to permit respondents (applicants in the *control* case) to employ "any lawful means to prevent further violation" rather than limited to divestiture.

reversed its final report and order of January 11, 1963 and granted such *control* application on the basis of *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc.*, 80 MCC 511 (Shein's), holding that the doctrine of prohibition of "split-offs", as here, was subject to the exception that it could not be applied where applicants "were not offending parties."[3] [J.S. A-43]. Although the Commission, on motion of applicants, waived its Rule 1.101(e) [J.S. B-1] relaing to late filing of the petition (the vice being in the Commission reopening an order final under Rule 1.101(a) (3) [J.S. B-1] on the motion of a party rather than on its own motion or initiative) but failed to waive, and applicants did not seek waiver of, Rule 1.101 (f) [J.S. B-1, 2] prohibiting the consideration of successive petitions on the "same ground." Appellees admit the *issue* that applicants "were not offending parties," was considered [J.S. A-26 and pp. 413 and 414 following A-42] but contend *Shein's* case was not previously cited. Such consideration is only as to the form and not as to substance, and was not logical rationale.

Appellants filed petitions to the reversal by the Commission in its report and order of June 29, 1964, raising the procedural, rule violations, and statutory objections aforesaid. By order of October 20, 1964 [J.S. A-57] the Commission denied such petition of Appellants, and made effective the order of June 29, 1964.

On appeal the District Court upheld the orders complained of [J.S. A-1], but without consideration of the

[3]Such finding failed to take into consideration that in the *Yellow Transit* case the Commission had found that Inland was an offending party.

violation of Commission's Rules 1.101(a)(3) or 101 (f) [J.S. B-1] or that the reopening of an otherwise final order is permissive *only* on the Commission's own motion and initiative and not by motion of a party. It did not consider that *Yellow Transit* case involved the same rights and the law of the case as here involved and holding Inland an "offending party", so that *Shein's* case was not applicable because Inland was an offending party; nor did it pass on the violation by the Commission of its own rules, without waiver, nor the resulting arbitrary and capricious action of the Commission in ultimately applying the rule of the *Shein's* case when the rule of the *Yellow Transit* case had been adopted and applied to the same rights on prior consideration of another proposed purchaser.

The MOTION TO AFFIRM by Appellees The United States of America and the Interstate Commerce Commission is predicated upon erroneous contentions (1) that the issue is one of substantial evidence and the Commission expertise should not be disturbed; (2) that the granted petition of applicants was not "successive" because it presented "a new ground" under *Shein's* case; and (3) that the "split-off" doctrine is not of continuing concern because as a result of statutory amendment "split-offs are therefore no longer a possible source of duplicate interstate operating rights." Such contentions do not properly appraise the facts, the law, and the Commission orders complained of, nor do they treat with the several other grounds in Appellants' JURISDICTIONAL STATEMENT submitted as substantial grounds for consideration of this case by this Court as specified below.

ARGUMENT

Appellees' Argument Fallacious.

Appellants admit the propriety of the rule of Commission expertise where the orders are supported by substantial evidence and issued in accordance with law. Here, however, the orders violated procedural statutes and Commission rules.

1. The finding of lack of dormancy of Inland's rights as a matter of fact [J.S. A-52] was predicated upon "the test of substantiality," not defined, and without basic findings with respect to such conclusion. Such conclusion is factually contrary to the basic findings in the January 11, 1963 report [J.S. A-35, 36], not overruled, and required partial cancellation as a condition to approval. Even *Shein's* case, so heavily relied upon by Appellees, required cancellation of the non-operated routes. Further, the "test of substantiality" as herein applied differs from that applied in *Gillette Motor Transport, Inc. — Control — Voss*, 93 MCC 765 and cases therein cited, as in those cases the "test of substantiality" as applied by the Commission required the cancellation of the non-operated routes. Such differing application of the test herein was arbitrary.

2. No finding was made on the contention of total dormancy as a matter of law, as required by Commission policy. *Stewart-Investigation of Operations*, 87 MCC 681, 697-8. Failure to so find resulted in arbitrary action on the part of the Commission. Appellees reply that the power to control does not render such

operation of Inland unlawful, but this does not consider the findings in the November 15, 1963 report of the Commission [J.S., p. 414, following A-42] "that the two carriers were unlawfully controlled and managed in a common interest."

3. Appellees contend that the application of the exception to the "split-off" doctrine under *Shein's* case was a reasonable policy determination within Commission discretion. Yet, it does not consider the arbitrary and capricious result thereof, since a precisely contrary result has been reached relating to the same Inland carrier in the *Yellow Transit* case. While the doctrine of stare decisis does not apply to the decisions of the Commission, consistency of its administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. *N. L. R. B. v. Mall Tool Co.*, 119 F. 2d 700; *Tallman v. Udall*, 324 F. 2d 411; *Dixie Highway Exp., Inc. v. U.S., et al.*, ... F. Supp. ...... Further, a collateral estoppal was created by the *Yellow Transit* case against Inland to contend contrary to the application of the "split-off" doctrine. *B. & O. R. Co. v. N. Y., N. H. & H. R. Co.*, 196 F. Supp. 724 (745).

4 Appellees contend that the reviewing court's determination is limited to determination of the existence of substantial evidence, but they do not consider that the principal issues herein are predicated upon Appellants' claim of arbitrary action resulting from procedural violations and non-adherence to pronounced policy by the Commission. Furthermore, the application of the exception in *Shein's* case herein contrary to

the Commission's fact finding in *Yellow Transit* case was arbitrary and capricious.

5. Appellees' contention that the "split-off" doctrine is not of continuing concern because "split-offs are therefore no longer a possible source of duplicate interstate operating rights" as a result of amendments to 49 U.S.C. 306 in 1962 (76 Stat. 911) terminating the automatic right of holders of intrastate certificates to use them for interstate transportation, is to ignore the effect of the amendment. Contrarily, such amendment breathed life into the interstate effect of such intrastate certificates so "split-off" from interstate rights and which had been registered with the Commission prior to the 1962 amendments by granting them "Certificates of Registration" as to interstate operations. Thus, Appellants herein, and others similarly so situated, holding intrastate rights became entitled as a matter of right and law to "Certificates of Registration" coextensive with the "split-off" interstate rights herein involved. Under the "split-off" doctrine of the Commission, the corresponding interstate rights theretofore "split-off" could not be transferred. The problem remains as to all of those rights "split-off" prior to the 1962 amendments. The large number of carriers affected by such "split-offs" is evidenced by the legislative history of such 1962 amendments, 2 *U.S. Code Congressional and Administrative News*, 87th Cong., Second Session, 1962, p. 3165 et seq. Such amendments cut-off the opportunity of "split-off" after 1962, but left those numerous "split-offs" occurring prior thereto to be dealt with under Commission precedents, such as in *Yellow Transit*,

and such issue is of continuing concern, as such operating rights are not terminable except on express statutory provision..

Other Substantial Grounds For Consideration By This Court.

The MOTION TO AFFIRM by Appellees The United States of America and the Commission failed to consider in any manner the other grounds in Appellants' JURISDICTIONAL STATEMENT submitted as substantial grounds for consideration of this case by this Court:

(1) In a prior decision involving the identical operating rights (the *Yellow Transit* case), the Commission refused to authorize the "split-off" of such identical rights to another carrier, and there the parties stood in the same position as applicants here. Appellees have ignored the *Yellow Transit* case, although the Commission's action in applying a different standard than previously applied on the same rights on proposed transfer to a different purchaser, constitutes the later action of the Commission as arbitrary.

(2) The order of June 29, 1963 waiving Rule 1.101 (e) [J.S. B-1] was arbitrary and void because it authorized reconsideration of the July 23, 1963 order, final under 49 U.S.C. §17(9) [J.S. B-8] and Rule 1.101 (a)(3) [J.S. B-1], upon the petition of applicants and not on the Commission's own volition.

(3) The Commission did not waive, nor was waiver by applicants sought of, Rule 1.101(a)(3) [J.S. B-1] with respect to the administrative finality of the order

of July 23, 1963 [J.S. A-40] nor Rule 1.101(f) [J.S. B-1, 2] with respect to the prohibition against consideration of a successive petition on the "same ground" as the petition previously denied by the order of July 23, 1963 [J.S. A-40].

(4) Applicants did not submit a new ground, but only the "same grounds" under such improperly granted petition, citing only the *Shein's* case, not previously cited by them and which was in derogation of the law of the case, the *Yellow Transit* case; and, therefore, the action of the Commission thereon was arbitrary and void as violative of its own rules. The mere citation of an additional case in support of a contention previously made does not constitute other than the "same grounds" but is merely additional argument on the "same grounds" already plowed.

(5) While conceivably the Commission might have reopened such administratively final order of July 23, 1963 on its own motion [*Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Sprague. v. Woll*, 122 F. 2d 128 (7 Cir. 1941), Cert. Den. 314 U.S. 669; and *Erie R. R. Co. v. United States*, 59 F. Supp. 743, 64 F. Supp. 162 (S. D. Ohio 1945)], the power of the Commission to so reopen is limited, under 49 U.S.C. §17 (6) [J.S. B-8] to reconsideration on the petition of a party only under "such general rules as the Commission may establish . . . ." Where, as here, the reconsideration was upon application of a party, in violation of the Commission's Rules 1.101(a)(3) and 1.101 (f), the reconsideration was arbitrary and void.

(6) The orders of the Commission of June 29, 1964

and October 20, 1964 are arbitrary, unreasonable, capricious, void, and constituted an abuse of discretion by the Commission, because:

(a) There had been an objectionable "split-off" of interstate and intrastate rights, which resulted in the creation of duplicate operating rights, and as a result thereof, the approval of the control of the operating rights herein would require proof of public convenience and necessity.

(b) There was no substantial evidence to support the finding that the operating rights sought to be controlled were not dormant. At most, such finding was predicated upon "the test of substantiality," not defined nor supported by reasonable rationale, and arbitrarily contrary to other applications of such "test".

(c) The grant of authority was not properly conditioned upon the cancellation of all operating authority sought to be controlled, except between San Antonio, Houston, Corpus Christi, Bishop, and Aransas Pass, Tex. Although these orders did not undertake to reverse the findings in the order of January 11, 1963, they did ignore the prior findings that the substance of the operations had been limited to operations between these named points [J.S. A-35, 36] but that no need existed to pass upon the question of whether a portion of the operating rights should be cancelled [J.S. A-37] because of the result therein reached of denial of the *control*

application. Hence, the result reached in these orders, not based upon adequate findings nor reasonable rationale, and contrary to the prior findings not set aside, and Commissions precedents, constituted the action as arbitrary, capricious and void.

(d) Total dormancy of the operating rights sought to be controlled existed as a matter of law because of the unlawful control by Central [J.S. 414, following A-42].

(e) The grant was not conditioned upon the cancellation of rights sought to be controlled which are duplicative with those of Central Freight Lines Inc., Southwestern Motor Transport, Inc., and Alamo Express, Inc., although applicants agreed thereto.

(f) They are predicated upon an inferential representation by Central Freight Lines Inc. that it would be successful in its lawsuit pertaining to the acquisition of control of Alamo Express, Inc., whereas in *Walker v. Central Freight Lines*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), Writ Denied, N.R.E., the issue of the acquisition of control by Central of Alamo Express has been finally adjudicated against Central by the Texas courts.

(g) They are predicated upon representation that there is no market for the interests unlawfully acquired in the carrier sought to be controlled,

although there is no evidence with respect thereto, nor as to what efforts have been made to market such interests.

(h) They are predicated upon a finding relative to negotiations relating to purchase of reversionary rights of the "split-off" intrastate rights coextensive with the interstate rights sought to be controlled, but there is no evidence with respect thereto.

(i) Applicants did not establish the statutory criteria required by 49 U.S.C. §5 for the approval of the control application, including failure to establish among other things, that the transaction is consistent with the public interest, the effect of the proposed transaction upon adequate transportation service to the public, that the total fixed charges resulting will not burden Central or Inland, that the interest of carrier employees will not be affected, or that full utility has been made of all operating rights. The record before the Commission was silent with respect to these requisite matters of proof.

It is manifest that the questions on which the decision of this cause depends are so substantial as to require further consideration by this Court.

WHEREFORE, Appellants pray that the Motion To Affirm by Appellees The United States of America and the Commission be denied and that this Court enter an appropriate order noting probable jurisdiction and that the case shall stand for argument.

Respectfully submitted,

REAGAN SAYERS
Third Floor, Century Life Bldg.
Fort Worth, Texas 76102
EWELL H. MUSE, JR.
415 Perry Brooks Bldg.
Austin, Texas 78701
Attorneys ofr Appellants

RAWLINGS, SAYERS, SCURLOCK & EIDSON
Of Counsel

CERTIFICATE OF SERVICE

I certify that I have served copy of the foregoing on all parties of record in compliance with Rule 33 of Revised Rules of this Court.

Dated at Fort Worth, Texas this 1st day of September, 1965.

REAGAN SAYERS